110-215

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 193.

JOHN F. VINAL, PLAINTIFF IN ERROR,

vs.

THE WEST VIRGINIA OIL AND OIL LAND COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

FILED NOVEMBER 6, 1880.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 193.

JOHN F. VINAL, PLAINTIFF IN ERROR,

VS.

THE WEST VIRGINIA OIL AND OIL LAND COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

INDEX.

	Original.	Print.
Caption	1	1
Cause docketed	1	1
Summons	2	1
Return	3	2
Declaration	4	2
Account filed with declaration	5	2
Affidavit of John F. Vinal	7	3
Plea of defendant	9	4
Order of attachment	9	5
Order removing cause	11	5
Petition for removal	12	6
Affidavit of B. S. Compton	13	6
Bond for removal	14	7
Clerk's certificate	15	7
Rule to plead	16	7
Plea	16	8
Specifications of off-sets	18	8
Amendment to bill of particulars	25	12
Rule to show cause granted	25	12
Plaintiff's itemized statement of account	26	12
Trial	33	15
Verdict	35	16
Motion to set aside verdict filed	35	16
Do	36	16
Judgment	42	19
Bill of exceptions tendered and signed	42	19
Writ of error allowed	42	19
Bill of exceptions	43	19
Writ of error	50	22
Citation	51	23
Proof of service	52	23
Bond	53	23
Clerk's certificate	54	24

1 UNITED STATES OF AMERICA,
District of West Virginia:

At a circuit court of the United States for the fourth judicial circuit, in and for the district of West Virginia, continued and held at the city of Parkersburg, in said district, on Thursday the 23d day of September, A. D. 1875—present the honorable Morrison R. Waite, Chief Justice of the United States, and honorable Hugh L. Bond, judge of the fourth judicial circuit of the United States—among others the following proceedings were had:

JOHN F. VINAL
vs.
THE WEST VIRGINIA OIL AND OIL LAND COMPANY. } In assumpsit.

Removed from the circuit court of Ritchie County.

On motion of the defendant, who produced certified copies of the original papers on file in the circuit court of Ritchie County, it is ordered that this cause be docketed in this court.

The copies above referred to are in words and figures following, to wit:

Pleas in the circuit court of Ritchie County, at the court-house of said county, at a circuit court held and continued for said county on
2 the 28th day of April, 1875.

JOHN F. VINAL, PLAINTIFF,
vs.
THE WEST VIRGINIA OIL AND OIL LAND COMPANY, defendant. } In assumpsit and upon attachment.

Be it remembered that heretofore, to wit, on the 24th day of July, 1874, came the plaintiff, by his attorney, and sued out of the clerk's office of the circuit court of said county of Ritchie a summons against the said defendant, which summons, with the return thereon, is in the words and figures following, to wit:

The State of West Virginia to the sheriff of Ritchie County, greeting:

We command you that you summon, the West Virginia Oil and Oil Land Company, a corporation created and existing under and by virtue of the laws of the State of Michigan, doing business in the county of Ritchie, West Virginia, to appear before the judge of our circuit court, at the court-house of Ritchie County, at rules to be held in the clerk's office of said court, on the first Monday of August next, to answer John F. Vinal of a plea in assumpsit, damages fifty-five thousand dollars (55,000$);
3 and have then and there this writ. Witness Wm. H. Douglas, clerk of our said court, at the court-house of said county, this 24th day of July, 1874, and in the 12th year of the State.

WM. H. DOUGLAS.

Return.

Executed the within summons on the within-named The West Virginia Oil and Oil Land Company, on the 3d day of August, 1874, by delivery a copy thereof in writing on that day to J. C. Gilman, an agent of the said company residing in the county of Ritchie, the said company being a corporation other than a bank, and there being no mayor, rector, president, cashier, treasurer, or other chief officer, or a member of the board of directors, trustees of the said company, within the State at the time, upon whom service could be had.

B. F. MITCHELL, *S. R. C.*

And on another day, to wit, at rules held in the clerk's office of the said circuit court, on the rule-book of said court, the following order was entered, to wit:

JOHN F. VINAL
vs.
THE WEST VIRGINIA OIL AND OIL LAND COMPANY. } In assumpsit.

Summons returned executed. Nar. filed and C. O.

4 The nar. or declaration referred to in the foregoing order is in the words and figures following, to wit:

WEST VIRGINIA,
Ritchie County, to wit:

In the circuit court thereof.

John F. Vinal complains of the West Virginia Oil and Oil Land Company, a corporation created, organized, and existing under and by virtue of the laws of the State of Michigan, which has been duly summoned, &c., of a plea of trespass on the case for non-performance of promises and undertakings:

For that whereas the defendant on the 1st day of January, A. D. 1874, at the county aforesaid, was indebted to the plaintiff in the sum of $55,000 for the price and value of goods and chattels then and there bargained and sold by the plaintiff to the defendant at its request, and in $55,000 for the price and value of goods and chattels then and there sold and delivered by the plaintiff to the defendant at its request, and in $55,000 for the price and value of work and labor then and there done, and materials for the same, provided by the plaintiff for the defendant at its request,

5 and in $55,000 for money then and there lent by the plaintiff to the defendant at its request, and in $55,000 for money then and there paid by the plaintiff to the use of the defendant at its request, and in $55,000 for money then and there had and received by the defendant for the use of the plaintiff, and in $55,000 for money found due from the defendant to the plaintiff on account then and there stated between them; and whereas the defendant afterwards, to wit, on the 2d day of January, 1874, at the county aforesaid, in consideration of the premises respect-

ively, then and there promised to pay the said several sums of money respectively to the said plaintiff on request; yet the said defendant has disregarded its said promises, and has not paid any of the said sums of money or any part thereof to the said plaintiff, although often requested so to do, to the damage of the plaintiff $55,000. And thereupon he brings this suit, &c.

J. B. JACKSON,
JOHN A. HUTCHINSON, &
SCOTT, COLE & MERRICK,
Attorneys for Plaintiff.

The account filed with the foregoing declaration is in the words and figures following, to wit:

West Virginia Oil and Oil Land Co. to John F. Vinal, Dr.

	1860.		
6	August	7. To 726$\frac{24}{35}$ bbls. oil, 28°, at $15.20	11,036 72
	1870.		
Jan'y	31st	" 423$\frac{38}{42}$ do. do. do. do.	6,444 54
June	5.	" 5 R. R. tickets, 13.00	65 00
	1871.		
May	30.	" 5 R. R. tickets to Chicago, 12.00	60 00
July	18.	" pa' expenses to Monroe, Michigan	33 33
Oct.	20.	" do. do. do. do.	33 33
	21.	" " " to Parkesly twice	
		To buy oil from Moore & Mattingly	5 60
	1872.		
Jan'y	16.	" 2,105$\frac{28}{35}$ bbls. Globe oil, shipped as per oil $\frac{3}{4}$, at 16.80	35,372 40
		" 608$\frac{21}{35}$ bbls. Globe oil.	
		" 111$\frac{4}{35}$ " ret'd.	
		497 " nett, at 12.81	6,356 57
May	15.	" 1 boiler flue del'd Globe Oil Co	3 40
"	"	" 17$\frac{1}{2}$ lb. heavy gum packing to Coville, 75	13 13
"	"	" 10$\frac{1}{2}$ lb. do. do. do. " B. G. C., "	7 68
"	16.	" 50 oil bbls. painted and trimed. @ 2 00	100 00
July	12.	" paid expenses to Monroe, Michigan	33 33
	20.	" one seventh ($\frac{1}{7}$) of $43,000 nett earnings of Globe Oil Company	6,142 74
Sept.	24.	" 5 R. R. tickets to Chicago, @ 12.00	60 00
Oct.	17.	" paid exchange on N. Y. draft	1 87
	1873.		
April	2.	" W. H. Wolfe, costs protest overdue paper	10 26
May	5.	" 2,061 ft. 2" tubing, @ .45	927 86
"	15.	" 35 oil bbls., @ 1.91	66 85
"	"	" 16 pine lumber to Beach	1 12
	17.	" 525 boards & joists, d'l'v'd belts on bill	10 50
		Ass'd am't company's bell-fittings	26 65
			65,457 38

7 And on another day, to wit, at rules held in the clerk's office of said court on the first Monday of September, 1874, on the rule-book of said court the following order was entered of record, to wit:

JOHN F. VINAL
vs.
THE WEST VIRGINIA OIL AND OIL LAND Company. } In assumpsit.

1874, September rules, C. C. C. & W. E.

And on another day, to wit, on the 29th day of September, 1874, came the plaintiff, by his attorney, and filed in the clerk's office of the said circuit court of Ritchie County an affidavit, which affidavit is in the words and figures following, to wit:

JOHN F. VINAL
vs.
THE WEST VIRGINIA OIL AND OIL LAND Company.
} In assumpsit in the circuit court of Ritchie County.

John F. Vinal, the plaintiff in the above-named action, being duly sworn, says on oath that the nature of the claim sued for in this action is a balance on account for oil sold and delivered by the plaintiff to the defendant, and for money paid by the plaintiff for the defendant on ac-
8 com'odation papers, and money expended on expenses in traveling for the use and benefit of said company at its request, and also for barrels, oil-well fittings, tools, &c., furnished the defendant by the plaintiff at its request; that the affiant verily believes that he is fully entitled to recover in this action at least the sum of ten thousand dollars, and that the same is now due and payable, and that there is present cause of action therefor, and that the defendant is a foreign corporation.

JOHN F. VINAL.

WEST VIRGINIA,
Wood County, to wit:
Subscribed and sworn to before me this 28th day of September, 1874.
WM. H. HUNTER,
Notary Public.

And on another day, to wit, at a circuit court held and continued for the county of Ritchie, at the court-house of said county, on the 26th day of November, 1874, the following order was entered of record, to wit:

JOHN F. VINAL
vs.
THE WEST VIRGINIA OIL AND OIL LAND Company.
} In assumpsit.

9 This day came the parties, by their attorneys, and thereupon the defendant for plea says that it did not assume in manner and form as in the plaintiff's declaration against it is alleged; and of this it puts itself upon the country. The plaintiff doth the like. Issue is therein joined.

And the said defendant, for further plea, says that it has well and truly paid the debt in the plaintiff's declaration mentioned; and this it is ready to verify. Issue is therein joined.

And on motion of the defendant leave is given it to file its specifications of setts-off in sixty days from this date, and this cause is continued.

And on another day, to wit, on the 20th day of January, 1875, came the plaintiff, by his attorney, and sued out of the clerk's office of the circuit court of Ritchie County an order of attachment against the said defendant, which order of attachment, with the return of the sheriff thereon, is in the words and figures following, to wit:

Order of attachment.

JOHN F. VINAL, PLAINTIFF,
vs.
THE WEST VIRGINIA OIL AND OIL LAND Company, defendant.

The plaintiff in this case having filed his affidavit as required by
10 law, the sheriff of the *of the* county of Ritchie, or a constable of any district thereof to whom this order may come, is hereby required, in the name of the State of West Virginia, to attach the estate of the defendant sufficient to pay the sum of ten thousand dollars (10,000$) and the costs of this suit, and make return of his proceedings under this order to the next term of the circuit court of the county of Ritchie.

Witness Wm. H. Douglas, clerk of said court, this 20th day of January, 1875.

WM. H. DOUGLAS, *Clerk.*

Return thereon as follows, to wit:

By virtue of this attachment I have this day attached the following personal property of the West Virginia Oil and Oil Land Company, to wit: One large iron treating tank; 200 barrels of oil, 28° gravity; 80 barrels, 29° gravity; 40 barrels of oil, 28° gravity; one iron tank; 1,300 barrels of oil, 29° gravity, Globe oil; one fire-proof safe, and four large wooden tanks at Petroleum.

B. F. MITCHELL, *S. R. C.*

And now on this day, to wit, the 28th day of April, 1875, at a circuit court held and continued for the county of Ritchie, at the court-house of said county, the following order was entered of record, viz:

11 JOHN F. VINAL, PL'T'F,
vs.
THE WEST VIRGINIA OIL AND OIL LAND Company, def't. } In assumpsit.

This day came the defendant, by its attorney, and filed its petition under the laws of the United States, alledging it is a resident of the State of Michigan and that the plaintiff is a citizen of West Virginia; that the amount in dispute in this cause, exclusive of interest, exceeds five hundred dollars; and filed an affidavit that affiant has reason to believe, and does believe, that from prejudice and local influence the defendant will not be able to obtain justice in the circuit court of Ritchie County, and filed a proper bond, with George Loomis and Okey Johnson as securities, and moved that the said cause be removed for trial into the circuit court of the United States for the district of West Virginia. It is therefore ordered that this cause be, and the same is hereby, removed for trial into the circuit court of the United States for the district of West Virginia, and the clerk of this court is directed forthwith to make certified copies, under the seal of this court, of the process therein, and all pleadings, depositions,

testimony, and other proceedings therein, and deliver the same to the defendant.

12 The petition referred to in the foregoing order is in the words and figures following, to wit:

To the honorable James M. Jackson, judge of the circuit court of Ritchie County:

Your petitioner, the West Virginia Oil and Oil Land Company, humbly represents to your honor that it is a foreign corporation created under the laws of the State of Michigan, and having its principal office in said State; that it is a non-resident of the State of West Virginia; that one John F. Vinal has brought suit against your petitioner in the circuit court of Ritchie County, in assumpsit, to recover a large sum of money against your petitioner; that the amount in dispute in said suit, which is now pending and undetermined in said court, exceeds the sum of five hundred dollars; that said Vinal, the plaintiff, is a resident and citizen of West Virginia.

Your petitioner further sheweth unto your honor that it has reason to believe, and does believe, that from prejudice and local influence it will not be able to obtain justice in said State court in the said county of Ritchie.

Your petitioner therefore here tenders its bond as required by law, and prays that under the laws of the United States in such cases made and provided the said cause may be removed for trial into the circuit

13 court of the United States for the district of West Virginia; and as in duty bound it will ever pray, &c.

THE WEST VIRGINIA OIL & OIL LAND CO.,
By Counsel.

LOOMIS, SANDS, BLAIR & JOHNSON, *Sol's.*

The affidavit referred to in the foregoing order is as follows, to wit:

JOHN F. VINAL
vs.
THE WEST VIRGINIA OIL AND OIL LAND Company.

In assumpsit in the circuit court of Ritchie County.

Personally appeared before me, Wm. H. Douglas, clerk of the circuit court of Ritchie County, B. S. Compton, president of the defendant, The West Virginia Oil and Oil Land Company, who, being duly sworn, says that the above-styled suit is now pending and undetermined in the circuit court of Ritchie County; that the amount in dispute in said cause, exclusive of interest, exceeds the sum of five hundred dollars; and the plaintiff is a resident and citizen of the State of West Virginia, and the defendant a resident of the State of Michigan, and is a non-resident of the State

14 of West Virginia; and that affiant has *room* to bel'eve, and does believe, that from prejudice against the said defendant and local

influence against it the said defendant will not be able to obtain justice in such State court in Ritchie County.

B. S. COMPTON.

Taken, sworn to, and subscribed before me this 28th day of April, 1875.

WM. H. DOUGLAS, *Clerk.*

The bond referred to in the foregoing order is in the words and figures following, to wit:

Know all men by these presents that the West Virginia Oil and Oil Land Company, George Loomis, and Okey Johnson are held and firmly bound unto John F. Vinal in the sum of five hundred dollars, to the payment whereof well and truly to be made we bind ourselves, our successors, heirs, and assigns, jointly and severally, firmly by these presents. Signed, sealed, and dated this 28th day of April, 1875.

The condition of the above obligation is such that whereas the said John F. Vinal has instituted an action of assumpsit in the circuit court of Ritchie County against the above-bound The West Virginia Oil and Oil
Land Company, and the said defendant has filed its petition to the
15 said circuit court of Ritchie County to have said cause removed for trial into the circuit court of the United States for the district of West Virginia: Now, if the above-bound The West Virginia Oil and Oil Land Company shall enter in the said circuit court of the United States for the district of West Virginia on the first day of the next session copies of the process against it in said cause, and of all pleadings, depositions, testimony, and other proceedings in the said cause, then this obligation to be void, otherwise to remain in full force and virtue.

WEST VIRGINIA OIL & O. L. CO.,
By B. S. COMPTON, *Pres.* [SEAL.]
GEO. LOOMIS. [SEAL.]
OKEY JOHNSON. [SEAL.]

WEST VIRGINIA,
County of Ritchie, ss:

I, Wm. H. Douglas, clerk of the circuit court for the county and State aforesaid, certify that the foregoing is a full and complete transcript of the record and proceedings in the aforesaid cause as the same are on file or of record in my office.

In testimony whereof I have hereunto signed my name and affixed my official seal this 21st day of May, A. D. 1875.

WM. H. DOUGLAS, *Clerk.*

16 And on another day, to wit, on the 24th day of September, A. D. 1875, in the circuit court of the United States for the district of West Virginia, among others the following order was made and entered of record, to wit:

JOHN F. VINAL
vs.
THE WEST VIRGINIA OIL AND OIL LAND COMPANY. } In assumpsit.

This day came the parties, by their attorneys, and on motion of the

plaintiff, by his attorney, a rule is awarded against the defendant to file its pleas to the plaintiff's action by Monday next.

And on another day, to wit, on the 5th day of October, 1875, the following order was made and entered of record, to wit:

JOHN F. VINAL
vs.
THE WEST VIRGINIA OIL AND OIL LAND COMPANY. } In assumpsit.

This day came the parties, by their attorneys, and the defendant for plea saith that it did not assume upon itself in manner and form as the plaintiff against it in his declaration hath alleged; and of this it
17 puts itself upon the county, and the plaintiff doth the like. And the defendant, for further plea, saith that it hath well and truly paid the debt in the plaintiff's declaration mentioned, and this it is ready to verify; to which plea the plaintiff replies generally, and puts himself upon the county, and the defendant doth the like; and the defendant files specifications of sets-off, and the plaintiff takes time.

The specifications of off-sets above mentioned are in the words and figures following, to wit:

18 *J. F. Vinal with Globe Oil Company.*

[Sheet No. 1.]

By following oil shipped and sold by S. E. Clark, ag't, rec'd from J. F. Vinal, viz:

1871.					
Feb'y.	Shipment to Hartly & Co.,	Globe oil	1,840	gals.
	" " Maxwell, W. & Co	" "	2,254²	"
	" " C. E. Ward & Co	" "	2,264²	"
M'ch.	" " J. D Thompson, Sons & Co.,	" "	2,247²	"
June 1.	" " N. Central R. R. Co.,	" "	2,253	"
"	" " Maxwell, W. & Co.,	" "	2,245²	"
" 9.	" " J. L. Thompson, Sons & Co.,	" "	2,236	"
	" " J. J. Nessle, P. ag't.,	" "	4,486²	"
" 29.	" " W. Melling P. ag't.,	" "	4,514	"
			24,341²	"
				"
			608 $\frac{2}{5}$	"

JOHN F. VINAL:

Take notice that upon the trial of your case vs. The West Virginia Oil and Oil Land Co., in assumpsit, in the circuit court of the United States for the district of West Virginia, the said defendant will rely upon the foregoing account.

WEST VIRGINIA OIL AND OIL LAND CO.,
By LOOMIS, SANDS AND JOHNSON, *Att'ys.*

19 *J. F. Vinal in a/c with Globe Oil Co.*

[Sheet No. 2.]

1870.		Dr.	Cr.
Nov. 14.	To d'ft on O. E. Ward & Co., N. Y.	$500 00	
" 21.	" " " " " "	500 00	
Dec. 9.	" " " Maxwell, Wheeler & Co., 2 mo's	500 00	
" 20.	" " " " " " 1 "	500 00	
1871.			
Jan'y 5.	" " " " " " 2 "	500 00	
" 20.	" " " " " " 2 "	750 00	
" "	" " " " " " 70 d'ys	600 00	

| | | |

21 *J. F. Vinal in ⅜c with Globe Oil Co.*

[Sheet No. 3.—Continued.]

	Dr.	Cr.
Amounts forward	$30,017 26	$2,800 65
To interest on foregoing drafts and monies dated at and subsequent to July 1, '71, reckoned from maturity of same to June 10, '74	4,162 58	
Balance carried forward to W. Va. O. & O. L. Co. ⅜c, sheet No. 2		31,379 19
	$34,179 84	$34,179 84

J. F. Vinal in ⅜c with Globe Oil Co.

[Sheet No. 4.]

			Dr.	Cr.
1871.		By following oils received at Petrolum, into our tanks, viz:	*Bbls.*	*Gals.*
Nov.	6.	" oil del'd, crude, per Col. Bukey's statement	88	08
1872.				
Jan'y	25.	" " " " " " "	71	01
Jan'y to March		" " " " in iron, clarified	874	19
March	7.	" " " "	114	28
"	29.	" " " "	13	24
April	2.	" " " "	102	21
"	9.	" " " "	230	02
May	14.	" " " "	276	17
"	16.	" " " " Col. Bukey's statement	124	10
			1 895	12/42 bbls.
		Deduct am't shipped away & sold by yourself, viz:		
1872.				
Jan'y	12.	Globe shipped to N. B. Coodge & Co 56.36		
1873.				
Jan'y	4.	" " by yourself, parties not known 54.30	111	26
			1,783	12/42 bbls.
		To storage on the above am't of balance of oils from June 11, '73, to June 10, '74, inclusive, say 1,783 12/42 bbls., 1 year, at 50c		891 80
		To storage on 56.36 shipped Coodge & Co., Jan'y 12, '72, from Nov. 6, '71, say 2 mo's, 5c		5 69
		" " on 54.36 shipped Jan'y 4, '73, from Jan'y, '72, say 1 year at 50c		27 37
		Carried forward to W. Va. O. & O. L. Co. ⅜c, sheet No. 2		$924 86

22 *J. F. Vinal in ⅜c with West Va. Oil & Oil Land Co.*

[Sheet No. 2.]

			Dr.	Cr.
1872.		To balance from Globe Oil Co., sheet No. 3	$31,379 19	
		" storage ch'g'd from G. O. C., sheet No. 4	924 86	
Dec.	3.	To 8 new pkgs & preparing same Col.. @ $2.30	18 40	
	14.	" tubing oil from McGregor tract 235.27 bb., @ 25c	58 92	
1873.				
Jan'y	4.	" 50 new pkgs and prepa'g for Globe Oil, @ 2.40	120 00	
"	"	" tubing & clarifying ch'g's on 54.30 & shipping	35 11	
"	9.	" 50 pkgs & preparing fee, 31° oil to St. Louis, 2.30	115 00	
"	"	" shipping charges, @ 10c	5 00	
"	13.	" 36 new pkgs to ship 30° oil, & shipping, @ 2.40	86 40	
"	"	" painting 6 bbls., @ 10	60	
"	"	" time & labor of men getting up 5 bbls. oil out of mud into shed, transferring oil from heavy pkgs and regauging, 15	1 50	
"		" To cash p'd W. Va. Transp. Co. for tubing your oil from Smoot nose well	61 17	
"	"	" ship ch'g's on tank car No. 9, with oil to A. Gunnison & Co., 89.02 bbls., @ 5c	4 45	
"	8.	" tubing oil from Briar Knob 265.07 Of this our Co. had 92.38 172.09, 25	43 06	
April	2.	" tubing oil from Briar Knob 223.34 Of this our Co. had 42.26 181.08, 25	45 30	
"	7.	" shipping ch'g's on 25 pkgs. 31° oil shipped " " " 25 " 29½° " " @ 10	5 00	
	8.	" tubing oil from W. Run 369.07 Of this W. Va. Co. had 209.07 160, @ 25	40 00	
	14.	" tubing oil from McGregor tract, 96.03, 97.31, 109 17, at 25	75 82	
May	17.	" " " " Briar Knob, 257.14, @ 25	64 34	

July	" labor & expense by B. G. Compton, our agent, & men under his ch'g' & in our employ, hauling tubing pipes to & from & laying line to McGregor lease & to Vinal's well for the purpose of tubing the oil from said well to Petroleum, per agreement made by Vinal, ag't	33 00	
			813 07
	Carried forward		33,117 12

23 *J. F. Vinal in a/c with West Va. Oil & Oil Land Co.*

			Dr.	Cr.
1872.				
	To am't bro't forward		$33,117 12	
July 28.	To d'ft of P. Jones, treas., at 75 d's, July 18, to get discounted for co.'s use	3,219 87		
	By disc't on d'ft, 4830; by 2 c'ks *c'ks* S. N. B., N. Y., 2,000	2,048 30		
			1,175 57	
Aug. 8.	To d'ft of Col. C. on W. M. & Co., 4 mo's	2 000 00		
" 12.	" " " " " " " 3 "	1,000 00		
" 20.	" " " " " " " 3 "	1,000 00		
			4,000 00	
	By above d'ft of Aug. 8, ret'd & costs			2,001 34
Sept.	To d'ft of Col C. on J. H. C. & Co., N. Y., favor of J. F. Vinal for disc't at 2' Nat'l B'k, P'b'g	2,876 69		
	By c'k to sup't, Oct. 4th, at P'b'g $2,000			
	" proport'n of dis'c't for 2,000 26 25			
		2,026 25		
			850 44	
Oct. 17.	To d'ft on Maxwell, W. & Co. to get dis'c't ½ for Vinal's use & ½ for our	2,000 00		
27.	By am't p'd by Vinal at 2' Nat'l B'k, part of am't of Col. C.'s d'ft on 'm above, c'ks p'd back to Vinal by sup't, $1,000, and ½ discount ch'g's, 23.75	1,023 75		
			976 25	
Nov. 14.	To d'ft on F. S. Pease, Buff		664 65	
Dec.	" " on N. Y., p'd by Col. C. to Vinal at Monroe		2,500 00	
31.	To paid following d'ft, to take up maturing paper at 2d Nat'l B'k, Parkersburg:			
	D'ft at 1 day on M. V. Bently	1,000 00		
	" " 1 mo. " " " "	2,084 91		
	" " 2 " " " " "	1,836 09		
		5,221 00		
	By following paper taken up, viz:			
	Coville & Garber acc., due Dec. 25–28	1,000 00		
	J. H. Carrington & Co., " " Nov. 9–12	2,876 69		
	Maxwell, W. & Co., " " Jan'y	1,000 00		
	Int's, exch'g', & protest costs	137 53		
	Tel. bill rendered by Vinal	10 20		
		5,024 42		
			196 58	
			$43,476 61	$2,001 34

24 *J. F Vinal in a/c with West Va. Oil & Oil Land Co.*

[No. 2.—Continued.]

			Dr.	Cr.
1873.				
	Brought forward		$43,476 61	$2,001 34
March	By N. Coodge, balance for tubing line	26 65		
May 5.	" 35 oil bbls. in shed, 1.90	66 50		
" 10.	" 1,120 5/12 ft. of line tubing, had for tubing line, per B. G. Co., 40c	448 10		
" "	" 941 5/12 ft. do. at Petroleum, 40c	376 66		
				917 91
	To storage on following oils not entered before, viz:			
1873.				
Jan'y	On 143.27 bbls. oil, 1 mo., 5c	7 18		
	" 28.22 " " Jan'y to April, 3 mos., 5c	4 28		
Apr. 2.	" 181.08 " " 1 mo., 5c	9 06		
May 29.	" 160 " " from Jan'y to May, 4 mo., @ 5c	32		
			52 52	
	To interest on foregoing drafts and monies dated subsequent to July 1, 1872, from maturity to June 10, 1874		1,279 73	
	Balance June 10, 1874			$41,889 61
			$44,808 86	$44,808 86
1874.				
June 10.	To balance		$41,889 61	

25 And on another day, to wit, on the 27th day of November, 1877, the following order was made and entered of record, to wit:

JOHN F. VINAL
vs.
THE WEST VIRGINIA OIL & OIL LAND CO. } In assumpsit.

This day came again the parties, by their attorneys, and thereupon the plaintiff, by leave of the court, amends his bill of particulars heretofore filed in this cause, by charging against the defendant one-seventh of $43,000, the net earnings of the Globe Oil Co., instead of one-ninth, as heretofore charged in said bill of particulars; and the plaintiff also, by leave of the court, files a bill of counter sets-off to the bill of sets-off heretofore filed by the defendant.

And on another day, to wit, on the 15th day of January, A. D. 1880, the following order was made and entered of record, viz:

JOHN F. VINAL
vs.
THE WEST VIRGINIA OIL AND OIL LAND CO. } In assumpsit.

On motion of the defendant, by its attorney, a rule is awarded against the plaintiff, returnable on Monday, January 19th, 1880, to show cause why he should not file in the papers of this cause an itemized
26 statement of his account giving credits as well as debits; and the plaintiff appears, by his attorney, and waives service of said rule, but objects to the granting of said motion.

And on another day, to wit, on the 19th day of January, A. D. 1880, the following order was made and entered of record, to wit:

JOHN F. VINAL
vs.
THE WEST VIRGINIA OIL AND OIL LAND COMPANY. } In assumpsit.

This day came the plaintiff, in obedience to a rule awarded against him on a former day of this term to show cause why he should not file in the papers of this cause an itemized statement of his account, giving credits as well as debits, and filed here in court such statement.

The statement referred to in the foregoing order is in the words and figures following, to wit:

27 *West Va. Oil & Oil Land Co. in a/c with John F. Vinal.*

BALANCE SHEET.

To balance from sheet 1 or A..... Average due and payable Sept. 19, 1870.	3,329 49	
To balance from sheet B..... Average due & payable Sept. 19th, 1872.	4,726 74	
To balance from sheet C..... Average due & payable on or before Sept. 19, 1872.	6,142 86	
To balance from sheet D..... Average due & payable April 1st, 1873.	1,394 92	
		$15,594 01
By am't from sheet E.....	$502 20	
1879. Aug. By costs in case remanded from court of appeals.....	617 00	
		1,119 20
		$14,474 81

28 A.

(Sheet 1 or A.)

West Va. Oil and Oil Land Company in a/c with John F. Vinal.

1869				
Aug.	7.	To 726 1/4 bbls. 28° oil.		
1870				
Ja'y	31.	" 423 3/8 " 28° "		
Aug.	6.	" 638 9/10 " 23° "		
		1,788 3/4 " 71,542 gals. 28°, @ 38 pr. gal. net or $15.20 pr. bbl.		$27,185 96
Nov.	10.	By 608 7/10 bbls. oil in tank of W. Va. O. & O. Co. this date		9,249 20
				$17,936 76
June	13.	To 5 railroad tickets to Chicago, @ $13.00		65 00
				$18,001 76

CR.

1869.				
July	19.	By cash	1,250 00	
Aug.	24.	" draft on Fancher & Co.	2,000 00	
Oct.	22.	" your acceptance	2,500 00	
"	30.	" 165 bush. of coal, @ 9c	14 85	
Nov.	30.	" 170 " " " @ 9c	15 30	
1870.				
Jan'y	4.	" check	250 00	
"	25.	" acceptance 60 days	2,000 00	
"	"	" " 70 "	2,000 00	
Fe'y.	9.	" cash	330 00	
"	"	" Warden acceptance, $676.00, @ 45 cts., r't'd protested	000 00	
"	28.	" 60 bush. coal, @ 9c	5 40	
March	31.	" 1,120 " " @ 9c	100 80	
April	11.	" your acceptance, 60 days	500 00	
"	30.	" 393 bush. of coal, @ 9c	35 37	
May	11.	" your acceptance, 90 days	500 00	
"	31.	" 390 bush. of coal, @ 9c	35 10	
June	3.	" draft 2 mo., 520 10/100, on F. F. Adams, protested	000 00	
"	"	" " " 528 " Geo C. Johnson	000 00	
"	30.	" 405 bu. coal, @ 9c	36 45	
July	30.	" your acceptance @ 2 mos.	500 00	
"	30.	" 665 bu. coal, @ 9c	59 85	
Aug.	11.	" your acceptance, 2 mo	300 00	
"	23.	" " note " "	500 00	
"	31.	" 435 bu. coal, @ 9c	39 15	
		Carried forward.		

29 *Sheet A*—Continued.

Sept,	17.	By your acceptance, 2 mos	500 00	
Oct.	3.	" draft on Maxwell, Wheeler & Co	600 00	
"	10.	" " " " @ 60 days	600 00	
"	25.	" cash per check, $520	100 00	
				$14,672 27
				3,329 49

Sheet B.

) il & Oil Land Co. to J. F. Vinal, Dr.

1871.						
Nov.	6.	To	88 135/1000	bbls.	S. l't K. grade,	30° oil.
"	28.	"	1,000 23/40	"	heavy oil,	28°
1872.						
Ja'y	25.	"	71 14/100	"	S. l't K. grade,	30°
March	7.	"	114 28/40	"	heavy,	28°
April	2.	"	107 27/40	"	"	28°
"	9.	"	230 181/1000	"	S. & Steen K. grade,	29°
Certificate		"	13 24/40	"	" " " "	29°
May	14.	"	312 20/40	"	heavy,	28
"	16.	"	124 784/1000	"	S. l't K. grade,	30°
Dec.	15.	"	42 33/40	"		29°
			2,105 20/40	"	oil @ $16. 80	$35,372 40

Cr.

By 1,871 $\frac{27}{28}$ p'c'k'g's, @ 2.08	3,904 52	
" tubing 1,115$\frac{23}{24}$ bbls. to P't, @ 40c	446 21	
" " 417$\frac{23}{28}$ " " " @ 25c	105 10	
" clarifying 2,105$\frac{23}{28}$, @ 10c	210 55	
" commissions on 2,105$\frac{23}{28}$ bbls. of oil, @ $16.80 per bbl. $35,372.49, @ 5 per cent.	1,768 62	6,435 00
		$28,937 40
By am't of cr. as per sheet G annexed		24,210 66
		4,726 74

30 P.

West Va. Oil and Oil Land Co., in ⅗ with John F. Vinal. *Cr.*

1871.				
Aug.	28.	By draft on Maxwell, Wheeler & Co., 60 days		600 00
Sept.	15.	" " " " " " 2 mo's		600 00
Oct.	15.	" " " " " " 2 "		1,000 00
Nov.	10.	" " " " " " 60 days		700 00
Dec.	5.	" " " " " " 90 "		1,400 00
"	15.	" " " " " " 90 "		1,500 00
1872.				
Feb.	21.	" " " " " " 90 "		600 00
March	13.	" " " " " " 3 mo's		1,000 00
April	1.	" " " " " " 90 days		600 00
"	15.	" " " " " " 90 "		600 00
May	4.	" " " " " " 3 mo's		850 00
"	8.	" " " " " " 3 mo's		800 00
June	7.	" " " " " " 3 "		1,000 00
"	15.	" " " " " " 3 "		3,000 00
"	20.	" " " " " " 3 "		1,000 00
Aug.	12.	" " " " " " 3 "		1,000 00
"	20.	" " " " " " 3 "		1,000 00
July	18.	" " " " " " 75 days, 3,219 87		
		discount 48 30		
			3,171 57	
		To 2 chcks sent to N. Y. St. Ct. B'k	2,000 00	
				1,171 57
Sept.	9.	By d'ft on J. H. Carrington & Co., N. Y., 2 mo'	2,876 09	
		To dis. 24.25, exch'g 2.50, cash p'd H. H. Beach $2,000.00	2,026 75	
				849 34
Aug.	3.	By d'ft dated June 3, Globe Oil Co., 60 days		800 00
Oct.	17.	" " Maxwell, Wheeler & Co., 3 mo's	2,000 00	
		For B. S. C. d'ft paid Beach 1,000.00, dis. 49.80	1,024 90	
				975 10
Dec.	14.	By cash N. Y. Exchange N. B.		2,500 00
Nov.	16.	" draft on S. F. Pease, Buffalo		664 65
				$24,210 66

Credited on sheet B.

31 G.

West Va. Oil and Oil Land Co., to John F. Vinal. *Dr.*

1872.			
Sept.		To profits on business and oil sold at close of business of Globe Oil Co., ⅓ of $45,000 after deducting debts	$8,142 86

D.

West Va. Oil & Oil Land Co., to John F. Vinal *Dr.*

1871.			
Oct.	20, 21.	To expens's twice to buy oil of Moore and Mattingly	5 60
		" 3 trips to Monroe, Mich., Co.'s business	100 00
May	30.	" 5 railroad tickets to Chicago	60 00
1872.			
May	15.	" 1 boiler flue delivered Globe Oil Co	3 40
		" 17½ lbs. gum packing, C. Covill	13 13
		" 10¼ lbs. " " B. G. C.	7 68
"	16.	" 50 oil bbls. painted & trimmed, @ $2.00	100 00
Sept.	24.	" 5 railroad tickets to Chicago	60 00
Oct.	17.	" paid exchange on N. Y. draft	1 87
1873.			
May	5.	" 2,061 ft. 11 in. 2-in. tubing, @ 45c	927 86
"	15.	" 35 empty oil bbls., @ $1.91	66 85

"	"	"	16 ft. pine lumber to Beach	1 12
	17.	"	525 ft. lumber to Betz. for refining	10 50
April	2.	"	paid W. H. Wolfee, costs on protest	10 26
		"	ass'd am't, N. Corry's bill, fittings	26 65
				$1,394 92

32 *West Va. Oil and Oil Land Co., in ⅜c with John F. Vinal.*

[Sheet E.]

1872.				
Jan'y	12.	By	50 new packages, at $2.08	104 00
May	1.	"	1 " " @ 2.08	2 08
Dec.	3.	"	8 " " @ 2.08	16 64
1873.				
Jan'y	4.	"	50 " " @ 2.08	104 00
"	8.	"	tubing 172 bbls. from b'k	43 06
"	13.	"	36 new packages	74 88
"	"	"	shipping charges	1 80
"	"	"	painting 6 bbls.	60
"	"	"	work on 5 bbls. oil	1 50
"	"	"	shipping charges on tank car	1 50
April	2.	"	tubing 181 bbls. oil on b'k	45 30
"	7.	"	shipping 50 " "	2 50
"	8.	"	tubing 160 " " from b'k	40 00
May	17.	"	" 257 " " " b'k	64 34
				$502 20

33 And on the same day another order was made and entered of record in words and figures following, to wit:

JOHN F. VINAL
vs.
THE WEST VIRGINIA OIL AND OIL LAND Company. } In assumpsit.

This day came again the parties, by their attorneys, and thereupon came a jury, to wit, S. R. Dawson, A. F. Lary, F. A. Robinson, Oliver Boughner, B. H. Maulsley, David Egan, Harrison Cain, E. W. Davis, D. D. Carr, Samuel Stewart, L. A. Beckwith, and Theo. Hughes, good and lawful me', who, being selected according to law, were sworn to well and truly try the issue joined in this cause, and a true verdict render according to the evidence; and having heard the evidence in part, and there not being time to hear the whole thereof, were adjourned until to-morrow morning at ten o'clock.

And on the following day, to wit, on the 20th day of January, the following order was made and entered of record, to wit:

JOHN F. VINAL
vs.
THE WEST VIRGINIA OIL AND OIL LAND CO. } In assumpsit.

This day came again the parties, by their attorneys, and the jury
34 which was empanelled and sworn on yesterday appeared pursuant to adjournment, who, having heard further of the evidence in this cause, and, there not being time to hear the whole thereof, were adjourned until to-morrow morning at ten o'clock.

And on the following day, to wit, on the 21st day of January, A. D. 1880, the following order was made and entered of record, to wit:

JOHN F. VINAL
vs.
THE WEST VIRGINIA OIL AND OIL LAND CO. } In assumpsit.

This day came again the parties, by their attorneys, and the jury that was empanelled and sworn on a former day of this term, appeared pursuant to adjournment, who having heard further of the evidence and arguments of counsel in this cause, and, there not being time to hear the whole thereof, were adjourned until to-morrow morning at 9 o'clock.

And on the following day, to wit, on the 22d day of January, A. D. 1880, the following order was made and entered of record, to wit:

JOHN F. VINAL
vs.
THE WEST VIRGINIA OIL AND OIL LAND CO. } In assumpsit.

35 This day came again the parties, by their attorneys, and the jury which was empanelled and sworn on a former day of this term appeared pursuant to adjournment, who, having heard further of the arguments of counsel, retired to their room to consider of their verdict.

And on the following day, to wit, on the 23d day of January, A. D. 1880, the following order was made and entered of record, to wit:

JOHN F. VINAL
vs.
THE WEST VIRGINIA OIL AND OIL LAND CO. } In assumpsit.

This day came again the parties, by their attorneys, and the jury empanelled and sworn on a former day of this term appeared, and on their oaths do say, "We, the jury, find for the defendant company and assess its damages against the plaintiff at the sum of $5,208.24.

And on the following day, to wit, on the 24th day of January, 1880, the following order was made and entered of record, to wit:

JOHN F. VINAL
vs.
THE WEST VIRGINIA OIL & OIL LAND CO. } In assumpsit.

This day came the plaintiff, by his attorney, and moved the court
36 to set aside the verdict found by the jury in this cause on yesterday, and order herein a new trial, and filed the grounds of said motion in writing.

The grounds of said motion above referred to are in the words and figures following, to wit:

JOHN F. VINAL
vs.
THE WEST VIRGINIA OIL AND OIL LAND CO.

In assumpsit in the circuit court of the United States for the district of West Virginia.

Motion of plaintiff, by his attorney, to set aside the verdict rendered in this cause in favor of the defendant (fee $5,208.24), which verdict was recorded.

January 23, 1880.

The plaintiff's attorneys move the court to set aside said verdict and award a new trial on the following grounds, viz:

First. The verdict is contrary to law and the evidence; the sets-off filed by the defendant are almost entirely made up of items charged by the Globe Oil Company against the plaintiff.

The jury has no right under the instructions of the court to consider the accounts of the Globe Oil Company, either for or against the plaintiff, except upon the hypothesis stated in the instructions given to them. The evidence before the jury established the right of the plaintiff to the
37 oil (1,788 bbls.) charged in the first sheet.

The 2,105 bbls. of oil was sold by the plaintiff to the defendant. If the jury believed otherwise from the evidence the plaintiff was still entitled to the balance conclusively shown on the first account, sheet A.

The second instruction precluded the consideration by the jury of the Globe Oil Company accounts pro and con if the jury believed from the evidence they concerned that company. The accounts of the defendants expressly charge the bulk of the items as Globe Oil Company's.

Second. The verdict is contrary to the instructions of the court in this: The burden of proof was on the defendant to show that the item of balance of Globe Oil Co.' account against plaintiff ($31,379.19) was stated between the plaintiff and defendant, and that the plaintiff had promised to pay it to the defendant, as claimed by the defendant.

On this item the plaintiff, offered to show that there were items charged in the Globe Oil Company account which went to make up this said alleged balance of $31,379.19 that were not correct. But his honor the court expressly ruled that if, as the defendant claimed, it was proven that the plaintiff had stated his account with the Globe Oil Company,
38 and the said balance had been struck, and had assented to that balance being assigned to the defendant company, and promised to pay it to the defendant, then and only on such proof in this case could that balance be set off against the plaintiff' claim.

The verdict of the jury shows that they disregarded this instruction; because if that balance was so proven by the defendant, as claimed, in the manner required by the instruction, then, even if the jury had allowed to plaintiff the balance on the oil on sheets A and B at the prices charged by the plaintiff, the defendant on such hypothesis would be entitled to at least $22,000 against the plaintiff; but the jury could not under the rule that the burden of proof was on the defendant to establish the said debt due the Globe Oil Company from the plaintiff have found that such balance was struck between the plaintiff and the Globe Oil Company, nor have

found that the plaintiff assented to its transfer to the defendant and promised to pay it, and that they did not so believe is proved by the fact that they did not find the defendant entitled to the said balance of $22,000, as they must have done to be consistent with that belief that that balance was proved, as claimed by the defendant.

The verdict of the jury is therefore contrary to the evidence. If
39 they did not have sufficient evidence to believe the defendant entitled to the said supposed balance of $31,379.19 it was impossible for them to find for the defendant, even if they disregarded or disbelieved the plaintiff's evidence as to the oil accounts on sheets D and B. This is susceptable of perfect demonstration, because the court did not permit the plaintiff nor the defendant to go into the proof of any items that go to make up the said supposed balance of $31,379.19 as a stated balance, the law, as the court told the jury, being that if the plaintiff accounted with the Globe Oil Company, and agreed to balance struck, and promised to pay that as a debt to the defendant, the jury were to allow that balance as a set off to the defendant, though they might find that the account between the Globe Oil Co. and the plaintiff was not accurately stated. Neither party being allowed in this action to go into a settlement of the Globe Oil Co. matters, the defendant claimed the $31,379.19 balance of Globe Oil Co. account; also account of storeage of same, $924.86—$32,304.05. Also items claimed to be due by plaintiff to defendant, but of which no proof was offered $9,585 56
Add above claim..... 32,304 05

Total claim..... $41,889 61

Strike out the $32,304.05, as the jury must have done, as not
40 proven, there would be *be* left nothing of the defendant's sets-off excepts the $9,585.56 items, on which not a syl'able of evidence was offered to the jury. Hence the account which the jury were authorized to adjust were, after excluding, as they did, said Globe Oil Company balance, on which, evidence was offerred, the plaintiff's accounts. And if the accounts on sheet A and B were considered closed and settled, or as relating to Globe Oil Co. business nothing could be found on them, this would leave the plaintiff's account on sheet D $1,389, which the plaintift fully proved.

Third. The verdict is against the instructions of the court in this: The verdict as shown above shows that the supposed balance Globe Oil Co. of $31,379.19 was rejected as not proven. And it requires but a glance to see that the jury disregarded the court's instructions as to not considering any of the Globe Oil Co. accounts except that alledged stated balance of $31,379.19, rejecting that the jury have taken it into their hands to compare and settle the accounts of both parties on the basis of mutual dealings, when the defendant's proof is that the balance is made up of Globe Oil Co. matters entirely. They have charged the defendant with
41 the 2,100$\frac{20}{40}$ bbls. of oil, or Globe Oil Co. oil, and have credited the defendant with the Globe Oil Co. accounts, as well as the 9,585.36, on which there was no evidence. There was no evidence that the defendant was entitled to any sum against the plaintiff, except on the theory that such balance of Globe Oil Co. account had been stated.

Fourth. The verdict must under the law and the evidence have been

for the plaintiff, for some one or more of the balances of his account, and could not have been for the defendant the sum found by the jury, but for at least $22,000, on the hypothesis of the said balance being stated as aforesaid, as claimed by the defendant, which proves that the jury did not obey the instructions of the court, but mistook their duty in the premises. In no event could the verdict, in any view of the case, have been as the jury have found.

For these reasons we respectfully pray that a new trial may be granted the plaintiff.

J. B. JACKSON,
JNO. A. HUTCHISON,
Att'ys for Plaintiff.

JANUARY 24, A. D. 1880.

42 And on another day, to wit, on the 28th day of January, A. D. 1880, the following order was made and entered of record, to wit:

JOHN F. VINAL
vs.
THE WEST VIRGINIA OIL AND OIL LAND CO. } In assumpsit.

This day came again the parties, by their attorneys, and the plaintiff moved the court to set aside the verdict of the jury rendered at a former day of this term in this cause, which motion being argued by counsel and considered by the court is overruled. It is therefore considered by the court that the said defendant recover against the said plaintiff the sum of five thousand two hundred and eight dollars and twenty-four cents, the damages by the said jury in their verdict ascertained, with interest thereon from the 23d day of January, 1880, and its costs about its defense in this behalf expended.

MEMO.—Be it remembered that upon the trial of this cause the plaintiff tendered a bill of exceptions to a ruling and opinion of the court, and prayed that the same may be signed, sealed, and saved to him, and made part of the record in this cause, which is accordingly done. And upon motion of the plaintiff a writ of error, to operate as a super-
43 sedeas, to the Supreme Court of the United States is allowed him, to take effect upon his enter'g into bond, with two good securities, in the penalty of seven thousand dollars, conditioned according to law, said bond to be approved by this court or one of the judges thereof.

The bill of exceptions referred to in the foregoing order are in words and figures following, to wit:

JOHN F. VINAL
vs.
THE WEST VIRGINIA OIL AND OIL LAND Company.

In assumpsit in the circuit court of the United States for the district of West Virginia.

Be it remembered that upon the trial of this cause, after the jury was sworn to try the issue, that the plaintiff, to maintain the issue upon his

part, offered himself as a witness to prove the item of charge as set out in his bill of particulars against the defendant, viz, "1872, Sept., to profits on business, and oil sold at close of business of Globe Oil Company, ¼ of $43,000.00; after deducting debts, $6,142.86." And to sustain said charge testified that the Globe Oil Company, which was a partnership company of seven persons, doing business in that name, as appears by the articles of copartnership, offered in evidence, which is in words and figures following, to wit:

44 This agreement, made and executed this 18th day of July, one thousand eight hundred and seventy-one, by and between S. Edward Clark, Corydon Coville, Joseph P. Maxwell, William E. Wheeler, Benjamin S. Compton, John F. Vinal, and Wellington Backus, and such other person or persons as now are or may hereafter be associated with them and *was* shall, enter into and execute this agreement, doing business under the name of the Globe Oil Company, at Petroleum, West Virginia, and elsewhere, party of the first part; and The West Virginia Oil and Oil Land Company, a corporation existing under the laws of the State of Michigan, and carrying on business at Petroleum aforesaid and elsewhere, party of the second part, witnesseth:

That the said parties hereto, in consideration of the premises, and for a valuable consideration paid by each to the other, hath and hereby doth covenant, promise, and agree to and with each other that they will severally and respectively keep, fulfill, and perform the several provisions and conditions hereinafter set forth, viz:

1st. That the said party of the first part will, as far as possible, purchase all such West Virginia natural lubricating oils of thirty
45 degrees gravity and below as may be in the market for sale.

2nd. That the parties hereto shall and will employ a person to act as the general agent of both in making sales of oils, and that each party shall bear and pay the equal share of the salery and expens*i*s of such agent.

3d. That such parties shall and will divide and share equally in all sales of oil made by either party, except as hereinafter provided, and in case of any losses arising by reason of a failure to collect the proceeds of such sales from the purchasers such loss shall be shared and borne by each party in proportion to the amount each party may be interested in such sales.

4th. All sales of oil made by either party shall be so made in the name of the par'y of the second part. All *all* collections for such sales shall be made in the name of the party of the second part, and the party of the second part shall be liable on account of all moneys that may be thus collected, and shall account for the same.

5th. All sales shall be confined to pure West Virginia lubricating oils of thirty degrees gravity and below, and the quantity, price, and terms of such sale shall accompany the order of shipment.

6th. No sale shall be so made by either party to the amount of five hundred barrels or more without a consultation with and the approba-
46 tion of the other. And in case of non-compliance with the conditions contained in this clause the other party shall be at liberty to decline taking or furnishing any part of such sale.

7th. If either party shall object to taking any interest in any sale ef-

fected by the other on account of the real or supposed irresponsibility of the purchaser or for any other cause, the party so objecting shall be at liberty to decline taking any interest in such sale by giving notice to that effect to the other party prior to the shipment of the oil. But in such case the other party shall be at liberty to complete such sale, and shall have all the benefit and stand all the loss which may arise out of the same.

8th. In case either party shall not have on hand, or shall not be able to furnish in season for the shipment thereof the quality or gravity of oil to supply the whole or any portion of the amount necessary to fill an order by whomsoever the sale may be made, and the other party has on hand or can furnish the same, such party shall be at liberty to fill such order, and shall have all the benefit and bear all the loss which may arise out of the same.

9th. The quality and gravity of all oil furnished by either party shall be acceptable to and be approved by the other, and the gravity of all oils furnished by both shall be tested and de'ermined by one and the
47 same instrument, which shall be that of the party of the second part, and shall be approved by the respective agents of the parties hereto.

10th. The barrels or packages used for the shipment of the oils shall all be of the best quality obtainable, and those furnished by each party shall be acceptable to and be accepted by the other, and all such barrels or packages used by the parties of the first part shall be designated by the letter "G," while those used by the party of the second part shall be designated by the letter "W," so that in case there shall be any defect in the same or in the oils contained therein the same may be thereby known and determined, and if any loss or injury shall result from such defect the party furnishing such packages or oils in which defects appear shall bear, pay, and defray all such loss and all expenses which may arise on account of the same.

11th. The party of the first part shall and will pay to the party of the second part the one equal one-half of the salery and expenses of the treasurer of the said party of the second part.

12th. In case either party shall furnish oil of a lower degree of gravity than the other to an amount exceeding the quantity furnished by the other, such gravities shall be allowed and adjusted by the payment to the
48 party so furnishing the same an amount equal to seven ½ per cent. on each degree of gravity in the oil so furnished in excess of the quantity of the same gravity so furnished by the other party, such per cent. to be determined by the prices at which such oils so furnished in excess shall have been sold.

13th. This agreement may be terminated at the end of sixty days after either party shall notify the other in writing of an intention or desire to terminate the same, and such notice may be signed by the superintendant, officer, or agent of either party, and may be served on the superintendant, officer, or agent of either party.

In witness whereof the said parties have hereunto set their hands the day and year first above written, the said parties of the first part individ-

ually and the said party of the second partby its executive committee, duly authorized by a resolution of the board of directors to execute the same.

S. E. CLARK,
B. S. COMPTON,
JOHN F. VINAL,
C. COVILLE,
W. BACKUS,
JOS. P. MAXWELL,
W. E. WHEELER,
C. W. PEMEY,
E. J. BOYD,
Executive Committee of W. Va. O. & O. L'd Co.

49 Of which the said plaintiff was one, in the month of August or September, 1872, discontinued its business and turned over its assets to the defendant company. That the said Globe Oil Company had turned over to said defendant company seven thousand barrels of oil, worth nine dollars per barrel, amounting to the sum of sixty-three thousand dollars. That the liabilities of said Globe Oil Company amounted to the sum of less than twenty thousand dollars; that there would be in the hands of the defendant company, after the payment of such liabilities, the sum of at least forty-three thousand dollars, of which sum the plaintiff was entitled to the one-seventh part, which amount was the item charged for in the plaintiff's bill of particulars herein referred to.

To the introduction of which testimony and of any testimony to sustain said item upon the part of the plaintiff the defendant, by its counsel, objected, and moved the court to exclude said testimony from the jury and strike out said item from plaintiff's account, which motion, having been argued by counsel and considered by the court, the said motion of defendant was sustained and said testimony excluded from the consideration of the jury, and the plaintiff prohibited from offering further testimony

50 to sustain his right to recovery as to said item of $6,142.86.

To which opinion of the court sustain'g said motion upon the part of the defendant, and excluding said evidence from the jury, and refusal to permit the plaintiff to offer further evidence to sustain said item the plaintiff, by his counsel, excepts, and this his bill of exceptions is signed, sealed, and saved to him and ordered to be made a part of the record.

(Signed) HUGH L. BOND, [SEAL.]
C't Judge.

The writ of error is in the words and figures following, to wit:

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the district of West Virginia, greeting:

Because in the record and proceedings as also in the rendition of the judgement of a plea which is in the said circuit court, before you, between John F. Vinal, plaintiff, and The West Virginia Oil and Oil Land Company, defendant, a manifest error hath happened, to the great damage of the said John F. Vinal, as by his complaint appears, we being willing that

error, if any there have been, should be duly corrected, an' full and
51 speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 13th day of March, in the year of our Lord one thousand eight hundred and eighty.

[SEAL.] L. B. DELLICKER,
Clerk of the Circuit Court of the United States for the District of West Va.

The citation, with the return thereon, are in the words and figures following, to wit:

THE UNITED STATES OF AMERICA:

52 To the West Virginia Oil and Oil Land Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, persuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of West Virginia, wherein John F. Vinal is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgement rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the United States of America, this 13th day of March, in the year of our Lord one thousand eight hundred and eighty.

L. B. DELLICKER,
Clerk C't C. U. S., D. of W. Va.

(Endorsed as follows:)

Served the within citation upon the West Va. Oil and Oil Land Company on the 13th day of March, 1880, at Parkersburg, West Va., by handing an office copy of the same to L. L. Johnson, assistant treasurer and director of said company, at the principal office of said company, no other officer be'g found upon whom it could be served.

GEO. W. PATTON,
U. S. M., Dist. W. Va.,
By G. B. GIBBONS, *Dep'y.*

53 The bond, with its endorsement, is in words and figures following, to wit:

Know all men by these presents that we, John F. Vinal and Thompson Leach, Charles C. Martin and John W. Dudley, are held and firmly bound unto the West Virginia Oil and Oil Land Company in the full and

just sum of seven thousand dollars, to be paid to the said The West Virginia Oil and Oil Land Company, its certain att'y, executor, administrator, or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this sixth day of March, in the year of our Lord one thousand eight hundred and eighty.

Whereas lately, at a circuit court of the United States for the district of West Virginia, in a suit depending in said court between the said John F. Vinal, plaintiff, and the said The West Virginia Oil and Oil Land Company, defendant, a judgement was rendered against the said John F. Vinal; and the said John F. Vinal having obtained a writ of error and filed a copy thereof in the clerk's office of said court to reverse the judgement in the aforesaid suit, and a citation directed to the said The West Virginia Oil and Oil Land Company citing and admonishing to be and
54 appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next;

Now the conditions of the above obligation is such that if the said John F. Vinal shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void, else to remain in full force and virtue.

(Signed)

JOHN F. VINAL.	[SEAL.]
THOMPSON LEACH.	[SEAL.]
CHARLES C. MARTIN.	[SEAL.]
JOHN W. DUDLEY.	[SEAL.]

Sealed and delivered in the presence of—
A. I. BOREMAN.

(Endorsed:)
Bond approved.

J. J. JACKSON,
Dist. Judge.

MARCH 10TH, 1880.

Filed in office this 13th day of March, 1880.

L. B. DELLICKER, *Clerk.*

UNITED STATES OF AMERICA,
District of West Virginia, ss:

55 I, L. B. Dellicker, clerk of the circuit court of the United States for the district of West Virginia, do certify that the foregoing is a true copy from the records and files of my office in the case of John F. Vinal vs. The West Virginia Oil and Oil Land Company, as directed to be made by the plaintiff's attorney.

In testimony whereof I hereunto set my hand and the seal of said court, at Parkersb'g, in said district, this 20th day of September, 1880.

[SEAL.]

L. B. DELLICKER,
Clerk Circuit Court U. S. D. W. Va.

(Indorsement on cover:) No. 193. John F. Vinal, plaintiff in error, vs. The West Virginia Oil and Oil Land Company. West Virginia C. C. U. S. Filed 6th November, 1880.

110-215

SUPREME COURT OF THE UNITED STATES.

NO. 193.

JOHN F. VINAL,
Plaintiff in Error.

vs.

THE WEST VIRGINIA OIL &
OIL LAND COMPANY,
Defendant in Error.

In Error to the Circuit Court of the United States for the District of West Virginia.

Brief of Counsel for Plaintiff in Error with Notes of Points and Authorities.

JOHN A. HUTCHINSON,
Counsel for Plaintiff in error.

SUPREME COURT OF THE UNITED STATES.

NO. 193.

JOHN F. VINAL,
Plaintiff in Error.

vs.

THE WEST VIRGINIA OIL &
OIL LAND COMPANY,
Defendant in Error.

In Error to the Circuit Court of the United States for the District of West Virginia.

Brief of Counsel for Plaintiff in Error with Notes of Points and Authorities.

BRIEF OF CASE.

1. This was an action at law, in Assumpsit, upon the common courts, brought by plaintiff in error in the Circuit Court of Ritchie County, State of West Virginia, in the year 1874. (Declaration p. 2–3. Record).

On 26th November, 1874, Defendant by counsel appeared in State court and filed pleas of *non-assumpsit*, and payment, and had leave to file sets-off. (p. 4. Record).

On 28th April, 1875, cause was removed on petition of Defendant into the Circuit Court of United States for District of West Virginia, and was docketed therein for trial on the 23rd of September, 1875. (p. 1. Record).

With plaintiff's declaration was filed an account of items, amounting in the aggregate to the sum of $65,457.38; one item of which was for one-seventh (1-7) of $43,000, net earnings of Globe Oil Company—**$6,142.86**, under date of July 20th, 1872. (p. 3. Record).

The defendant, on the 5th day of October, 1875, filed its account of set-off, (pp. 8, 9, 10, 11, Record,) in which it charged plaintiff with sundry items of account, claimed to be due by him *to the Globe Oil Company, amounting in the aggregate to the sum of* - - - - - - $31,379.19

And storage of Globe Oil to - - - - - 924.86

Total - - - - - - $32.304.05

At the January Term, 1880, of the Circuit Court, the action was tried before a jury upon the issues joined.

In the progress of the trial the plaintiff in error, sought to establish his right to recover the said sum of $6,142.86, the "one-seventh of $43,000, of net earnings of Globe Oil Company, a co-partnership, of seven members, and offered in evidence an agreement in writing being dated the 18th day of July, 1871, by and between S. Edward Clark, Corydon Coville, Joseph P. Maxwell, William E. Wheeler, Benjamin S. Compton; John F. Vinal and Wellington Backus, of the one part, and the defendant of the second part (see pp. 19, 20, 21, 22 of Record) and showed that the Globe Oil Company in August or September, 1872, had discontinued its business and turned over its assets to the defendant, including 7,000 barrels of oil, worth $9.00 per barrel, amounting to the sum of $63,000.00. That the liabilities of the Globe Oil Company, amounted to about $20,000.00, leaving about $43,000.00 of earnings or profits in the hands of the defendant, of which sum the plaintiff was justly entitled to the said sum of $6,142.86, the item so charged in his account filed with his declaration.

To the proof thus offered by the plaintiff, "the counsel for the defendant objected, and moved the Court to exclude said testimony from the jury and strike out said item from plaintiff's account, which motion was sustained, and said testimony excluded from consideration of the jury, and the plaintiff prohibited from offering further testimony to sustain his right to recover as to said item of $6,142.86." To which opinion and ruling of the Court the plaintiff excepted, and his bill of exceptions, setting forth these facts, was signed, sealed and made part of the record of said action. (p. 22. Record.)

Notwithstanding this ruling the Court suffered the jury to consider the said item of $31,379.19. of Globe Oil Company account, one of the items in the specifications filed by the defendant, as a proper set-off to the claim of the plaintiff, after striking out, and rejecting proof, on his part, the item of $6,142.86, one-seventh of the net profits of the business of the same Globe Oil Company.

On the 23rd of January, 1880, the jury rendered a verdict against the plaintiff in error for the sum of $5208.24.

On the 24th January, plaintiff's counsel filed a motion in writing for a new trial, setting forth the grounds of the motion, (pp. 17, 18, 19 of Record) which was overruled, and judgment rendered on the verdict for the defendant.

Referring to the set-off filed by the defendant, it will be observed that the total amount charged, to-wit: $41,889.61, is composed almost entirely of accounts of the Globe Oil Company against the plaintiff.

Turning to the bill of particulars of the plaintiff (pp. 13, 14, 15. Record) it will be seen that he has credited the defendant with the same items that make up the Globe Oil Company accounts, which, leaving out the $6,142.86, 1-7 the plaintiff's share in the profits of the Globe Oil Company business, more than over-balances the sets-off of the defendant, on this account. But the Court rejecting the evidence offered by the plaintiff to show that the defendant had the oil belonging to the Globe Oil Company which had been turned over to it to pay off the debts of the Globe Oil Company, and to distribute the net proceeds to the share holders, deprived the plaintiff of at least $6,142.86, although the defendant was permitted to set-off the entire Globe Oil Co. account against the plaintiff.

II. There are three principal errors relied on by the plaintiff in error, manifest on the record:

1. In excluding from consideration by the jury, the evidence offered and produced by the plaintiff contained in the Bill of exceptions (pp. 19–22. Record).

2. In prohibiting the plaintiff from offering *any further testimony to sustain his right to recover* the item of $6,142.86.

3. In permitting the defendant to set-off against the plaintiff the same account of the Globe Oil Company.

III. 1. It insisted, that it was error to reject the pro
offered by the plaintiff, set forth in Bill of Exceptions (pp. 1
22 Record.)

The facts there shown; That the Globe Oil Company
August or September, 1872, turned over its assets to the defe
dant, that such assets was $63,000.00 worth of oil; that the li
bilities of the Globe Oil Company were only about $20,050.0
leaving about net $43.000.00 that the plaintiff was entitled o
of this amount to one-seventh, i. e. $6,142.86; that the defen
ant and the plaintiff were parties to the agreement, were rel
vant and material to the issues joined on the pleas and sets-o
filed by the defendant to the action.

The action of assumpsit is an equitable one.

At common law, the right to set-off demands against th
plaintiff was limited to what may be embraced by the doctrin
of *recoupment.*

But in West Virginia and in Virginia for many years th
following statutes have been in existence:

"The assignee of any bond, note, account or writing, no
negotiable, may maintain thereupon any action in his own name
without the addition of "assignee" which the original oblige
or payee might have brought; but shall allow all just discount
not only against himself, but against the assignor, before th
defendant had notice of the assignment. In every such actio
the plaintiff may unite claims payable to him, individually
with those payable to him as such assignee."

Chap. 99. sec. 14, p. 538, Code W. Va.

"In a suit for any debt, the defendant may at the trial prove
and have allowed against such debt, any payment or set-o
which is so described in his plea, or in an account filed there
with, as to give the plaintiff notice of its nature, but not othe
wise. Although the claim of the plaintiff be jointly agains
several persons, and the set-off is of a debt not of all, but only
to a part of them, this section shall extend to such cut-off, if i
appear that the persons against whom such claim is, stand in the
relation of principal and surety, and the person entitled to the
set-off is principal. And when the defendant is allowed to file
and prove an account of set-off to the plaintiff's demand, the

plaintiff shall be allowed to file and prove an account of counter set-off, and make such ither defence as he might have made had an original action been brought upon such set-off, and in the issue, the jury, judge, or justice shall ascertain the true state of indebtedness between the parties, and judgment be rendered accordingly."

Chap. 126, sec. 3, p. 609, Code W. Va.

For a discussion of the law of set-off in Virginia and West Virginia, see

4 Minor Inst. 655–660.

5 Robinson Prac. 955 *et seq.*

If the defendant could set-off the Globe Oil Company accounts against the plaintiff, the latter ought have the right to counter set-off the Globe Oil Company accounts.

Robinson v. Beall, 3 Yeates 267.

Slipper v. Stidstone, 5 Term Rep. 493.

Holbrook v. Laskey, 13 Metcalf 132.

Waln v. Hewes, 5 S. & R. 471.

Warner v. Baker, 3 Wend 399.

If a debt due to the Globe Oil Company by the plaintiff Vinal could not be set-off by him with a claim he may have had against one of the firm of the Globe Oil Company, surely the claim of the plaintiff against the defendant could not be off-set by a claim of the Globe Oil Company against him. There should be some degree of mutuality. But the rule in favor of the defendant is no stronger than it is in favor of the plaintiff.

Jackson v; Robinson, 3 Mason 145.

Reed v. Whitney, 7 Gray 533.

Bridgeman v. Tileston, 5 Allen 372.

Young v. Black, 7 Cranch 565.

Hurbert v. Pacifiic Insurance Co. 2 Summer 471.

2. The Court erred in prohibiting the plaintiff from offering any testimony to sustain his right to recover the item of $6,142.86.

A claim or debt, though not a legal set-off, may be made so by the agreement of the parties.

This is settled law in Virginia.

Perkins v. Hawkins, 9 Grattan 649.

Under this rule, although the item of one-seventh of the Globe Oil Company assets, $6,142.86, might not be a legal claim against the defendant, yet by the conduct or agreement of the parties it might properly become so. Therefore it was too broadly ruled by the learned Circuit Court that *no evidence* should be given in support of that item by the plaintiff, without reference set-off of the defendant made up of the same Globe Oil Company accounts.

3. It was error to permit the defendant to recover on its accounts as filed, including the Globe Oil Company accounts. In no manner was it possible for the defendant to recover the verdict rendered, without the jury took into consideration the very Globe Oil Company accounts upon which the learned Court denied the plaintiff the right to offer proof (pp. 17, 18, 19, Record).

On well settled principles, we think this was error.

We respectfully submit that the judgment should be reversed, and a *venire de novo* awarded

JOHN A. HUTCHINSON,
Counsel for Plaintiff in error.

110-215

SUPREME COURT

OF THE

UNITED STATES.

——::——

JOHN F VINAL. *Plaintiff in Error,*

VERSUS

THE WEST VIRGINIA OIL & OIL LAND COMPANY,
Defendant in Error.

——::——

In Error to the Circuit Court of the United States for the District of West Virginia.

——::——

BRIEF FOR DEFENDANT IN ERROR.

SUPREME COURT

OF THE

UNITED STATES.

———::———

JOHN F VINAL, *Plaintiff in Error,*

VERSUS

THE WEST VIRGINIA OIL & OIL LAND COMPANY,
Defendant in Error.

———::———

In Error to the Circuit Court of the United States for the District of West Virginia.

———::———

BRIEF FOR DEFENDANT IN ERROR.

The only question arising upon the record in this cause is contained in one Bill of Exceptions appearing on pages 19, 20, 21 and 22, of the printed record.

It appears therefrom that the plaintiff in error and six other persons (*the said six other persons not being partners to this action*) doing business under the name of The Globe Oil Company, entered into a contract in writing with the defendant in error in reference to the sale of oil; and that in this action the plaintiff in error in one item of his Bill of Particulars, sought to charge the defendant in error with one-seventh of the net profits of the Globe Oil Company, up-

on the ground that the assets of said Globe Oil Company had been turned over to the defendant in error.

The court below sustained the objection of the defendant in error to the evidence offered in support of this item.

We maintain,

FIRST.

That there was no error in this ruling and opinion of the court below. The legal proposition therein asserted, that *one member of a partnership cannot alone maintain an action at law against a debtor of the firm for the recovery of his individual share in an amount claimed to be due the firm*, is so well settled, and is so elementary in its character, that neither argument nor authority is required to support it.

The motion for a new trial (see page 17, printed record) refers to the instructions of the court and the other evidence offered in the case, but such instructions and other evidence are not made part of the record, and therefore cannot be considered by this court.

The only ground of error relied upon in the record is too superficial to need further attention.

SECOND.

It is manifest that the writ of error in this case *was sued out merely for delay*, and therefore, under the provisions of section 2 of rule 23 of the court, damages at the rate of ten per cent., in addition to the interest should be awarded. The defendant has been delayed nearly four years, in the collection of its judgment, upon the most frivolous pretext. The court enforces the above rule rigidly.

See

West Wisconsin Railway Co., vs. Foley, 94 U. S., 100.

Whitney vs. Cook, 97 U. S., 607.

N. GOFF, JR.,

of Counsel for the Defendant in Error.

110-216

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 1,022.

C. J. HAMBRO & SON, A COMMERCIAL FIRM COMPOSED OF CHARLES J. HAMBRO, EDWARD RAWLINGS, EVERARD A. HAMBRO, AND ROBERT HERIOT, PLAINTIFFS IN ERROR,

vs.

N. W. CASEY, RECEIVER OF THE NEW ORLEANS NATIONAL BANKING ASSOCIATION.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

FILED OCTOBER 4, 1883.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 1,022.

C. J. HAMBRO & SON, A COMMERCIAL FIRM COMPOSED OF CHARLES J. HAMBRO, EDWARD RAWLINGS, EVERARD A. HAMBRO, AND ROBERT HERIOT, PLAINTIFFS IN ERROR,

vs.

N. W. CASEY, RECEIVER OF THE NEW ORLEANS NATIONAL BANKING ASSOCIATION.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

INDEX.

	Original.	Print.
Petition	1	1
Answer	3	2
Agreement waiving jury trial, &c	7	4
Statement of W. F. Halsey	8	4
Finding of facts and judgment	10	5
Petition for writ of error	14	7
Bond for writ of error	16	7
Clerk's certificate	19	8
Writ of error	20	9

(Title page:) United States of America. Circuit Court of the United States in and for the Fifth Judicial Circuit and Eastern District of Louisiana. No. 9,083. C. J. Hambro and Son vs. N. W. Casey, receiver. Bayne and Denegre, attorneys for C. J. Hambro and Son, plaintiffs, plaintiffs in error. Rouse and Grant, attorneys for N. W. Casey, receiver, defendant, defendant in error. Writ of error: Returnable to the Supreme Court of the United States on the second Monday of October, A. D. 1883.

1 UNITED STATES OF AMERICA.

Circuit Court of the United States for the Fifth Judicial Circuit and Eastern District of Louisiana.

C. J. HAMBRO AND SON
vs.
N. W. CASEY, RECEIVER. } No. 9,083.

Petition. Filed April 22nd, 1880.

To the Honorable the Judges of the Circuit Court of the United States in and for the Fifth Circuit, District of Louisiana.

The petition of Charles J. Hambro, Edward Rawlings, Everard A. Hambro, and Robert Herriot, composing the commercial firm of C. J. Hambro and Son, who reside in England and are aliens, shows that the New Orleans National Banking Association, a national bank organized under the laws of the United States, and N. W. Casey, receiver thereof, residing in New Orleans, are
2 indebted to them and their said firm in the sum of ten thousand six hundred and sixty-eight and $\frac{16}{100}$ dollars, as per annexed account and statement, which is made a part of this petition.

Petitioners aver that they have heretofore received dividend upon the amount of the bills referred to in said statement, the same being recognized as due and owing by the New Orleans National Banking Association and by N. W. Casey, receiver, but that no dividend has been paid upon the amount due to petitioners for notarial protest and legal fees and charges actually disbursed and paid by them, as stated in said account.

And petitioners further claim that there is due to them damages upon said protested bill amounting to nine thousand three hundred and twelve and $\frac{16}{100}$ dollars against the New Orleans National Banking Association and N. W. Casey, receiver, as endorsers of the bills described in the statement annexed.

Wherefore petitioners pray that the New Orleans National Banking Association, through N. W. Casey, receiver thereof, be cited to answer this petition, and, after due proceedings, be con-
3 demned to recognize petitioners' claim for ten thousand and six hundred and sixty-eight and $\frac{16}{100}$ dollars, as a debt due by

said New Orleans National Banking Association, to be paid in due course of administration; and petitioners ask for all equitable and general relief.

(Signed) BAYNE & RENSHAW,
Attys. for Petr.

Statement of charges incurred in Paris on protested drafts on

Seignouret Freres	fcs.	250,000
F. Dumont & Co	"	190,000
	fcs.	440,000

As follows: Notarial protests and attendant legal fees and charges, fcs. 6,467.10, c. fcs. 4.50, $1,423.80 currency @ 1.05 for gold $1,356 00

Also legal damages on said bills, viz: fcs. 440,000, 10 per cent, fcs. 44,000, c. Exch. fcs. 4.50, $9,777.77 currency @ 1.05 gold 9,312 16

Total charges 10,668 16

Answer. Filed April 22nd, 1880.

U. S. Circuit Court, District of Louisiana.

C. J. HAMBRO & SON
vs.
N. W. CASEY, REC'R OF N. O. NATIONAL Banking Asso'n. } No. 9,083.

4 And now comes said defendant and for answer to said plaintiffs' petition says:

1st. That the said banking association failed October 4th, 1873, and that at that time, and for some time prior thereto, the said plaintiffs were the London correspondents of said association, with whom they kept a running account, drawing bills against them and remitting other bills to cover such drafts; and the bills mentioned in plaintiffs' petition were so remitted for collection and credit; that afterwards, to wit, on the 17th day of November, 1873, said plaintiffs rendered their account current with and to said association, showing them to be creditors of said bank, the amount of said credit being adjusted at £18,618 12*s.* 5*d.*, which was reduced to our money in the sum of $89,788.30, and on the 18th day of May, 1874, the receiver of said bank issued his certificate recognizing said Hambro & Son as creditors thereof for the amount last aforesaid.

2. Afterwards, to wit, on the 24th day of May, 1874, said plaintiffs rendered a further and final account current, in which
5 the said bills of exchange mentioned in the petition were charged to said bank, and said account was adjusted, and on the 15th of March, 1877, said receiver issued his certificate to said Hambro & Son, recognizing them as creditors of said bank in the further sum of $29,767.95; upon the amount of which two certificates said plaintiffs have been paid pro rata dividends with all other creditors of said bank.

3. Defendant further says that in neither one of said accounts, so rendered by plaintiffs as aforesaid, is any charge made for the costs of protest of said bills, or the damages thereon now sought to be recovered in this suit; nor was any claim otherwise made therefor, until the current calendar year of 1880, shortly prior to the institution of this suit.

4th. Defendant further shows that said bills mentioned in the petition were drawn by the late firm of C. Cavaroc and Son, and endorsed by said bank; that said firm and the individual members thereof were afterwards adjudged bankrupts, and have been discharged as such, under the provisions of the act of Congress
6 in such case made and provided, and their estate has been distributed among their creditors who proved their debts.

5th. And defendants further aver that said bank, as endorser of said bills, was entitled to a dividend pro rata with other creditors of said bankrupts, upon the amount claimed by and allowed against said bank to said Hambro and Sons, and was admitted as a creditor of said bankrupts for the amount paid to said Hambro and Sons, upon that at by said bank, and received a dividend from said estate thereon, amounting to four per centum.

6th. And the defendant avers that by their statements of account, and by their failure to make any claim for the costs and damages now sued for, the said plaintiffs waived all claim thereto, if any they had, and all right to demand the same; and not having claimed anything on that account, defendant could make no claim against said bankrupt therefor, and is now precluded from any recourse against said bankrupts' estate for what defendant would be required to pay, if plaintiffs should now be permitted to prove their demands against said bank.

7 7th. And defendant further avers, that plaintiffs can in no event be entitled to both costs and charges attending protest of said bills, and damages thereon, as claimed, but is willing that plaintiff should be allowed such costs and expenses attending the protest of said bills as is legally chargeable therefor.

Wherefore he prays that plaintiffs' demand be rejected at their costs.

(Signed) ROUSE & GRANT,
Attys. for Deft.

Agreement waiving jury trial, &c. Filed May 31st, 1880.

U. S. Circuit Court.

C. J. HAMBRO AND SON
vs.
N. W. CASEY, RECEIVER. } No. 9,083.

We waive trial by jury and submit the case upon the following agreed statement of facts. The defendant admits the allegations of petition as to all matters of fact, but matters of law tending to fix liability on defendant are denied. It is admittted that
8 W. F. Halsey would swear to statement annexed, if his evidence on that point is admissible.

The plaintiffs admit the allegations of matter of fact in answer, except the last clause of paragraph 3, to wit: "Nor has other claim, otherwise made therefor until the current calendar year of 1880, shortly prior to the institution of this suit." But it is admitted that N. W. Casey would swear to the same if the evidence is admissible on this point. All conclusions of law denied.

(Signed) BAYNE & RENSHAW,
for Plffs.
ROUSE & GRANT,
for Deft.

Statement of W. F. Halsey annexed to agreement waiving jury trial.
Filed May 31st, 1880.

U. S. Circuit Court.

HAMBRO AND SON
vs.
N. W. CASEY, RECEIVER.

Action for recovery of legal costs and charges on protested French bill of exchange.

9 At the time of proving up the claim it was understood that each side reserved all legal rights, especially to amend and reajust the account, from time to time, as occasion arose.

This right the bank has already exercised to its advantage, and in issuing the certificate of indebtedness the receiver of the bank inserted the following clause:

"This indebtedness is subject to reduction by any amount that "may be recovered from the drawers or acceptors of these drafts, "and if any payment be made by said drawers or acceptors, it "will authorize the receiver to recall this certificate for a readjust- "ment of the bank's liability on said drafts, and to issue a new "certificate for the proper amount remaining due. It is also ex- "pressly understood that should payment be made by the drawers "or acceptors of these drafts, thereby reducing the indebtedness

"of this association as endorser, the excess of dividend paid by "this association on so much of the original amount of this cer- "tificate will be accounted for by the holder of said certificate, "and be deducted from the amount due for any further dividend "that may be paid by this association."

10 In granting the above right to the association the plaintiffs never intended to impair their own right to readjust the account in their favor to cover all legal and equitable charges, but, on the contrary, expressly reserved all legal rights.

The charges for protest, fees, &c., as stated in the petition, are correct and were paid by plaintiffs. The charge for damages is a question of law, and we claim that the same are due in addition to the charges paid.

(Signed) W. F. HALSEY.

Finding of Facts. Entered and filed June 15th, 1881.

United States Circuit Court.

C. J. HAMBRO AND SON
vs.
N. W. CASEY, RECEIVER OF THE NEW ORLEANS NAT. B'K'G ASSOCIATION. } No. 9,083.

This case having been submitted to the court with waiver of trial by jury, the court finds as facts:

1. The plaintiffs are the holders of certain bills of ex-
11 change drawn by Messrs. C. Cavaroc and Son, of New Orleans, Louisiana, to the order and endorsed by the New Orleans National Banking Association, of which N. W. Casey is receiver, and, as such, administering the assets of said association, which had and has its domicil in New Orleans, Louisiana, and is a nationel bank.

That part of said bills of exchange, amounting to two hundred and fifty thousand francs, were drawn on Seignouret Frères, of Bordeaux, France, and a part amounting to one hundred and ninety thousand francs were drawn on Messrs. F. Dumont and Co., of Havre, France, and all were protested at maturity for non-payment, and drawers and endorsers were duly notified. That the notarial fees and charges were thirteen hundred and fifty-six dollars, and were paid by plaintiff, and as to these there is no dispute.

2. That the legal damages under the law of Louisiana upon protest of foreign bills of exchange are ten per centum upon the principal sum specified in such bills, and that the bills herein mentioned amount in currency of the United States to ninety-three thousand one hundred and twenty-one dollars.

12 3. The court further finds that the New Orleans National Banking Association failed October 4th, 1873; that at that time and for some time prior thereto plaintiffs, who were bankers

in London, were correspondents of said association, with whom they kept a running account, drawing bills against them, and remitting other bills to cover such drafts, and the bills mentioned in plaintiffs' petition were so remitted for collection and credit.

4. That on the 17th of November, 1873, plaintiffs rendered their account current, showing them to be creditors of the New Orleans National Banking Association for eighty-nine thousand seven hundred and eighty-eight dollars $\frac{30}{100}$, and that on the 18th of May, 1874, the receiver of said bank issued his certificate recognizing the plaintiffs as creditors for said sum.

That afterwards, on the 24th of May, 1874, plaintiffs rendered a further account current, and in said accounts the bills of exchange mentioned in the petition were charged to said bank, and on the 15th of March, 1877, the receiver of said bank issued his certificate to plaintiffs, recognizing them as creditors for
13 the further sum of twenty-nine thousand seven hundred and sixty-seven and $\frac{95}{100}$ dollars, and upon said sums plaintiffs have been paid pro rata dividends with other creditors of said bank, but plaintiffs retain the bills of exchange.

5. That in neither of said accounts or certificates is any charge made for the costs of protest and charges paid by them, nor for the damages now involved in this suit, and plaintiffs did not present their claim for the same until a few months prior to the institution of this suit.

6. That C. Cavaroc and Son, the drawers of said bills of exchange, failed in October, 1873, and became bankrupts, and their estate has been distributed in the United States District Court for the District of Louisiana to creditors proving their claims, and paid to them four per cent. dividend, and that the receiver of the bank has collected dividends of four per cent. upon the dividends paid by the bank, and said bankrupts have been discharged.

That Seignouret Frères, the acceptors of part of the bills for 250,000 francs, failed the same time with the bank or soon
14 thereafter, and plaintiffs collected from their estate dividend of 35 per cent., $16,711\frac{66}{100}$, which was deducted by them when the certificate of receiver of the bank was issued to them. The other bills on Dumont & Co. were protested for non-acceptance and non-payment and nothing was received from them.

And after argument of counsel of the parties respectively, and upon consideration thereof, it is ordered, adjudged, and decreed, that the plaintiffs, C. J. Hambro and Son, do have and recover from the New Orleans National Banking *Banking* Association, the sum of thirteen hundred and fifty-six ($1,356) dollars with costs, to be paid in due course of administration pro rata with other creditors of said association.

Judgment rendered June 15th, 1881.

Judgment signed June 18th, 1881.

(Signed) EDWARD C. BILLINGS, *Judge.*

Petition for Writ of Error. Filed June 14th, 1883.

15 United States Circuit Court, Fifth Circuit, Eastern District of Louisiana.

C. J. HAMBRO AND SON
vs.
N. W. CASEY, RECEIVER OF THE New Orleans National Banking Association. } No. 9,083.

To the Honorable the Judges of the Circuit Court of the United States in and for the Fifth Circuit, Eastern District of Louisiana.

The petition of Hambro and Son, a commmercial firm composed of Charles J. Hambro, Edward Rawlings, Everard A. Hambro, and Robert Heriot, respectfully shows that they are aggrieved by the final judgment rendered herein on the 18th day of June, 1881, against them, rejecting a large part of their claim, exceeding nine thousand dollars thereof. Petitioners pray that a writ of error may be granted herein to them and citation may issue to plaintiff, and that said writ of error may be made returnable to the Supreme Court of the United States on the second Monday in October next, and that all orders necessary and proper may be made herein, and for general relief.

(Signed) BAYNE & DENEGRE,
for Deft. Hambro and Son.

Order.

16 A writ of error is allowed herein as prayed for, returnable to the Supreme Court of the United States on the second Monday of October next, upon petitioners furnishing bond, with good and solvent security, in the sum of two hundred dollars, conditioned as the law directs.

New Orleans, June 14th, 1883.

(Signed) EDWARD C. BILLINGS,
Judge.

Service accepted and citation waived, and the bond may be fixed at two hundred dollars.

June 14th, 1883.

(Signed) ROUSE & GRANT,
Attys. for Deft.

Bond for Writ of Error. Filed June 14th, 1883.

Know all men by these presents, that we, C. J. Hambro and Son, Charles J. Hambro, Edward Rawlings, Everard A. Hambro, Robert Herriot, as principals, and Charles F. Hoffman, as surety,

are held and firmly bound unto Nicholas W. Casey, receiver of the New Orleans National Banking Association, his certain
17 attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this 14th day of June, in the year our Lord one thousand eight hundred and eighty-three.

Whereas, lately at a Circuit Court of the United States, Fifth Judicial Circuit, holding sessions in and for the Eastern District of Louisiana, in a suit depending in said circuit court, wherein C. J. Hambro and Son and Charles J. Hambro, Edward Rawlings, Everard A. Hambro, and Robert Herriot are plaintiffs, and N. W. Casey, receiver of the New Orleans National Bank, is defendant, judgment was rendered against said plaintiffs in favor of said defendant, and the said plaintiffs having obtained a writ of error and filed a copy thereof in the clerk's office of the said circuit court to reverse the judgment in the aforesaid suit, and a citation directed to the said Nicholas W. Casey, receiver of the New Orleans National Banking Association, citing and admonishing him to be and appear at the Supreme Court of the United States to
18 be holden at Washington the first Monday of October next:

Now, the condition of the above obligation is such, that if the said C. S. Hambro and Son, Charles J. Hambro, Edward Rawlings, Everard A. Hambro, and Robert Herriot shall prosecute their writ to effect, and answer all damages and cost if they fail to make their plea good, then the above obligation to be void, else to remain in full force and virtue.

For C. J. HAMBRO AND SON.
CHAS. J. HAMBRO. [L. S.]
EDWARD RAWLINGS.
EVERARD A. HAMBRO. [L. S.]
ROBERT HERRIOT. [L. S.]
By their agent:
(Signed) CHAS. F. HOFFMAN.
" CHAS. F. HOFFMAN.

Bond approved.
(Signed) EDWARD C. BILLINGS, *Judge.*
June 14th, 1883.

19 United States of America, Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

CLERK'S OFFICE:

I, Francis A. Woolfley, clerk of the Circuit Court of the United States for the Fifth Circuit and Eastern District of Louisiana, do

hereby certify that the foregoing 18 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had on the trial of the case of C. J. Hambro and Son vs. N. W. Casey, receiver, No. 9,083 of the docket of the said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 22d day of June, A. D. 1883.

Two (2) words interlined; six (6) words erased. Approved.

[SEAL.] F. A. WOOLFLEY, *Clerk.*

I, Edward C. Billings, United States District Judge for the Eastern District of Louisiana, do certify that Francis A. Woolfley, whose name is signed to the above certificate as clerk of the Circuit Court of the United States for the Fifth Circuit and Eastern District of Louisiana, was, at the time of signing said certificate, and is now, the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand, at the city of New Orleans, in said district, this 22d day of June, A. D. 1883.

Three (3) words interlined. Approved.

EDWARD C. BILLINGS, *Judge.*

20 UNITED STATES OF AMERICA, *ss.*

The President of the United States to the Honorable the Judges of the Circuit Court of the United States in and for the Fifth Circuit, and holding sessions for the Eastern District of Louisiana, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between C. J. Hambro and Son, a commercial firm composed of Charles J. Hambro, Edward Rawlings, Everard A. Hambro, and Robert Heriot, and N. W. Casey, receiver of the New Orleans National Banking Association, a manifest error hath happened, to the great damage of the said C. J. Hambro and Son, as by their complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done